



INTERNATIONAL TRADE UPDATE

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Farm Bill Trade Provisions Affect All Importers

First Sale Valuation, Illegally Harvested Timber and User Fees Addressed

On May 22, the Food, Conservation and Energy Act of 2008 (better known as the Farm Bill) was enacted into law when Congress overrode President Bush’s veto of this legislation. Three provisions in the Farm Bill will particularly affect importers: Congress’ intervention on the “first sale” rule for customs valuation, a new ban on imports of products made from illegally harvested trees and other plants, and extension of the merchandise processing fee.

1. Congress Weighs In On First Sale Customs Valuation Debate

In January, U.S. Customs and Border Protection (CBP) surprised the business community — and Congress — with the publication of a proposal¹ to re-interpret the phrase “sold for importation in the United States” to mean the *last sale* in a series of sales transactions involving imported goods, rather than the *first sale*, as has been the judicially approved practice for nearly two decades. The U.S. importer community reacted strongly and quickly, lobbying the Bush Administration and the Congress to oppose the CBP proposal and filing many written comments explaining the basis for their opposition. The goal of the lobbying effort was to persuade CBP to permanently withdraw the proposal.

While Members of Congress wrote to the Secretary of Homeland Security and the Commissioner of Customs to express their strong concern, some Congressional staff (and some within the Administration) questioned whether CBP had enough information to evaluate the potential effect of its proposal. The Farm Bill provision on first sale, which was added during the House-Senate conference process and was as much of a surprise to the importer community as was the original CBP proposal, is an apparent response to the lobbying campaign.

The Farm Bill provision

Section 15422 of the Farm Bill provides a two part response to the CBP proposal. The first part is a “Sense of the Congress” direction to CBP, which is non-binding, but

1) <http://a257.gakamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E8-1140.pdf>

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nevertheless sends a powerful message. The second part is a mandate that requires specific agency action.

It is the “Sense of the Congress” that CBP “should not implement a change to U.S. Customs and Border Protection’s interpretation . . . of the term ‘sold for exportation to the United States,’ . . . for purposes of applying the transaction value of the imported merchandise in a series of sales, before January 1, 2011.”

The Sense of the Congress provision also sets some ground rules for CBP to resurrect its proposal after January 1, 2011. Specifically, Congress authorizes CBP to propose to change or change the first sale rule only on the condition that CBP (1) consults with and provides prior notice to the Congress 180 days before proposing the change and 90 days before publishing notice of the change, (2) provides notice to and takes into consideration the view of a key CBP-appointed private sector group known as the Commercial Operations Advisory Committee (COAC) 120 days before proposing the change and 60 days before publishing notice of the change, and (3) receives “explicit approval” from the Secretary of the Treasury.

Under the mandate language, the Farm Bill orders CBP, starting 90 days after enactment, and for a period of one year, to collect from importers “declarations” indicating whether they used the first sale rule to determine the transaction value of their entries. CBP is required to pass such data, on a monthly basis, to the U.S. International Trade Commission (ITC), so the ITC can determine the number of importers relying on the first sale rule in multi-tiered sales and the transaction value, by tariff classification and by sector, of goods entered using first sale valuation. The ITC is to then present its report to the House Committee on Ways and Means and the Senate Finance Committee.

What Does the Farm Bill Achieve?

Some believe the Sense of Congress language, even though non-binding, sends a strong message of disapproval to CBP

regarding a change to a last sale rule. Further, they believe there is now the possibility of “death by study.” A closer look, however, warrants a more guarded reading of the situation.

Notwithstanding Congress’ best intentions, the first sale provision in the Farm Bill does not give importers any long-term guarantees on the future of the first sale rule. First, the language does not bar CBP from implementing its proposal, but rather signals to the agency that it should first assess the impact of the change. So it may be that Congress has only prolonged for at least another two and a half years the uncertainty for business. Second, importers may face additional burdens as a result of the declaration that will now be required at the point of entry.

Next Steps

One message from the fallout over the original lack of consultation with the importer community may be that CBP should partner with importers, and with the Congress, in the development of the declaration the Farm Bill requires from importers. Another outstanding question is whether CBP will now formally withdraw its pending proposal. The lobbying effort is expected to continue with a goal of achieving both results.

2. Enforcement Crackdown on Imports of Products Made From Illegally Harvested Timber and Other Plants

A provision in the forestry title of the Farm Bill gives the U.S. Government the power to fine, and even jail, individuals and companies who traffic in illegally harvested wood and other plant products. This new law, and the import declarations it requires, will affect a broad range of manufacturers and importers of a variety of products made from wood, including paper, furniture, lumber, flooring, plywood, pallets or even picture frames.

The Farm Bill extends a century-old law, the Lacey Act, to reach timber and plants taken or transported in violation of U.S. or foreign law. The Lacey Act has long been used to

prosecute those who trade in illegally taken wildlife and fish. Now it will apply to a broad range of imported wood products, not just those from listed species. The Department of Justice already has indicated its intentions to use the Act to combat the trade in illegal timber, including enforcing significant declaration and paperwork requirements.² Penalties under the Act include civil administrative penalties, forfeiture of the trafficked goods, criminal fines or imprisonment. A Lacey Act violation may also trigger charges of smuggling or money laundering.

Foreign Timber Laws Enforceable in U.S. Courts

The Lacey Act extends the reach of foreign laws and regulations, by making it a violation of United States law to traffic in products made from wood that was harvested, transported or sold in violation of foreign law. The penalties depend on the extent to which a person handling goods actually knows, or should know in the exercise of due care, that the goods are, or are made with, illegally taken trees and plants. The key to avoiding or minimizing penalties is exercising due diligence in the sourcing of wood inputs.

New Import Declaration Requirements for Wood Products

Congress also added new import declaration requirements that reinforce the need to know precise sourcing information. Importers will be required to declare the scientific name of any plant contained in the goods, the value of the importation and the quantity of the plant, and the name of the country from which the plant was taken. Importers will need to obtain this information from their suppliers, and the suppliers will need to keep track of this information on a regular basis.

U.S. Government Already Cracking Down On Suspect Wood Products

A recent indictment illustrates the potential for other enforcement action against imports of furniture made with illegally logged timber. On April 16, a Federal grand jury in Newark indicted a Chinese furniture maker under the Endangered Species Act and the anti-smuggling statute for importing a container of baby cribs made with ramin, an endangered tree species. The indicted person and company face the potential of years of imprisonment and hundreds of thousands of dollars in fines.

Next Steps

The Lacey Act ban on imports of illegally harvested plants is in effect now, but the U.S. government will need to issue regulations to implement the new legislation. Such new regulations should clarify the import declaration requirements, which become enforceable in six months. In addition, since the G8 nations have committed to taking action to combat illegal logging, the Administration is likely to use the new Lacey Act tools provided by Congress to take high-profile enforcement efforts.

3. Merchandise Processing Fee Is Here To Stay

To help fund the new subsidies in the Farm Bill, Congress has extended to October 1, 2017 the merchandise processing fee (MPF), the user fee charged by U.S. Customs and Border Protection for processing an imported shipment requiring formal entry. The MPF was first imposed in 1986 for a limited term but has been repeatedly extended. The rate of the MPF is unchanged, at 0.21% of value, subject to a \$25.00 minimum and a \$485.00 maximum.

2) Testimony by Eileen Sobeck (Department Of Justice) to House Committee On Natural Resources, Oct. 16, 2007.